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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

JAMES M. CLEAVENGER,
Plaintiff,
vs.
CAROLYN McDERMED, BRANDON
LEBRECHT, and SCOTT CAMERON,
Defendants.

Case No. 6:13-cv-01908-DOC

**PLAINTIFF'S OBJECTIONS TO THE
COURT'S PROPOSED JURY
INSTRUCTIONS**

Plaintiff objects to the following categories of speech not being included:

Items 5 and 6 from Plaintiff's prior submission (internal Clery Act-related emails and complaints in September 2012):

As previously noted by the Court, “[t]hat [Plaintiff] chose to convey [his] views privately rather than publicly is not determinative of whether [his] expression is entitled to protection.” Order Granting in Part Defendants’ Motion for Summary Judgment (“Order”) at 13, citing *Thomas v. City of Beaverton*, 379 F.3d 802, 810 (9th Cir. 2004). The court in *Thomas* cited one of its earlier decisions to reiterate that “[t]he form of the speech—complaints to staff and superiors rather than to the general public—does not remove it from the realm of public concern.” 379 F.3d at 811, citing *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996).

The Court also previously discussed the Ninth Circuit’s holding in *Robinson v. York*, in which the plaintiff reported misconduct internally through conversations with superiors and emails to internal affairs. Order at 12, citing 566 F.3d 817, 822 (9th Cir. 2009). Plaintiff contends that his complaints to Sgt. Cameron, Lt. Lebrecht, Chief McDermed, and Randy Wardlow concerning the legality of his order to report only felonies falls within the holdings of the cases above, and within the scope of “misconduct related to . . . failure to follow applicable laws and regulations.” Order at 12.

Item 9 from Plaintiff’s prior submission (the filing of this lawsuit itself):

The Ninth Circuit’s opinion in *Alpha Energy Savers, Inc. v. Hansen*, elaborates on its holding in *Rendish*: “We have never required that discriminatory conduct or corruption must occur with regularity or any degree of frequency, or exceed some threshold of significance, in order to satisfy the public concern test. Rather, ‘[w]e have held that when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, . . . their speech is inherently a matter of public concern.’” 381 F.3d 917, 926 (9th Cir. 2004), citing *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9th Cir. 2004). “Litigation seeking to expose such wrongful governmental activity is, by its very nature, a matter

of public concern.” 381 F.3d at 927. Plaintiff understands this holding as protecting the act of litigation as First Amendment speech, if the lawsuit seeks to expose wrongdoing, misconduct, wastefulness, or inefficiency by government employees. There is no serious dispute that the complaint in this case sought to do that.

DATED September 22, 2015.

/s/ Mark McDougal

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CERTIFICATE OF SERVICE

I certify that on September 22, 2015, I served or caused to be served a true and complete copy of the foregoing **PLAINTIFF'S OBJECTIONS TO THE COURT'S PROPOSED JURY INSTRUCTIONS** on the party or parties listed below as follows:

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Via CM / ECF Filing

/s/ Mark McDougal

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